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**PLEA-BARGAINING IN INTERNATIONAL CRIMINAL TRIBUNALS: A
LEGITIMATE AND NECESSARY TOOL**

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PLEA-BARGAINING IN INTERNATIONAL CRIMINAL TRIBUNALS: A LEGITIMATE AND NECESSARY TOOL

MAJOR MATTHEW L. DUFFIN

I. INTRODUCTION

On 2 March 1996 authorities of the Federal Republic of Yugoslavia (FRY) seized and detained Drazen Erdemovic.¹ FRY transferred Erdemovic to the custody of the International Criminal Tribunal for the former Yugoslavia (ITCY) on 30 March 1996.² The tribunal later tried him for war crimes. The charges facing Erdemovic were not unusual for his crimes, one count of a crime against humanity and an alternative count of a violation of the laws or customs of war.³ What was unusual was how his trial would unfold.

Erdemovic, a mere boy when compared to most tribunal detainees, was just 23 years old when he committed his crimes.⁴ Ordered by superiors, he executed between 70 to 100 Bosnian Muslim men.⁵ The killing occurred at a farm near Pilica.⁶ It was to this farm the Bosnian Serb military or police personnel bused men who had earlier surrendered to the police or military authorities.⁷ Upon arrival, Serbs herded them into a field adjacent to a farm building.⁸ The victims were forced to stand up in a row with their backs facing Drazen Erdemovic and members of the 10th Sabotage Detachment.⁹ The men standing in

¹ *Prosecutor v. Drazen Erdemovic, Sentencing Judgment* Case No. IT-96-22-T, 23 Dec. 1996 (visited Mar. 23, 1999) <<http://www.un.org/icty/erdemovic/trialc/judgment/80305ms2-e.htm>> [hereinafter *Judgement*].

² *Id.* at I. Introduction and Procedural History, para. 2.

³ *Id.* at para. 1.

⁴ *Id.* at V. Application of the Law to the Facts, para. 16. He was 24 at the time he stood trial. Kitty Felde, *Bosnian Justice Relies on a Single Courtroom and no Police Force*, SACRAMENTO BEE, June 29, 1996, at B9.

⁵ *Judgement*, *supra* note 1, at V. Application of the Law to the Facts, para. 15.

⁶ *Id.* at IV. Evidence, para. 15.

⁷ Kitty Felde, *High time to start reeling in Bosnia's "Big Fish"*, HOUS. CHRONICALE, June 26, 1996 Outlook at 21.

⁸ *Judgement*, *supra* note 1, at IV. Evidence, para. 13.

⁹ *Id.*

line ranged in age from 17 to 60. Upon order, Erdemovic and his unit killed them.¹⁰ From that day alone, the summary executions numbered more than one thousand.¹¹

There are no words to describe the horror and tragedy of that scene. Yet out of this barbarism came an unexpected and fortunate turn of events that led Erdemovic to confession and a change in international war crimes procedure. The crime was committed under duress. Erdemovic faced the credible threat of his own death if he failed to follow his superior's orders.¹² According to Erdemovic's own account, they would have lined him up and shot him with the other Bosnian Muslim men if he disobeyed.¹³ Being an unwilling actor, he felt no loyalty to his commanders. He faced awful guilt about what he had done, and he chose from the very beginning to cooperate with investigators of the Office of the Prosecutor (OTP). On 22 May 1996, the prosecutor served the Erdemovic indictment. At his initial trial appearance, he pled guilty to one charge. The prosecutor dropped the other.¹⁴ Eventually, Erdemovic would plead guilty to a war crime. In return the prosecutor would drop the charge alleging a crime against humanity.¹⁵

These events were unprecedented. The Erdemovic plea developed into more than recognition of his efforts at reform, his deep remorse or his feelings of guilt. It became more than a chance to get critical testimony leading to the indictment of Radovan Karadzic and Ratko Mladic.¹⁶ This trial marked the first time ever,¹⁷ an accused pled guilty before

¹⁰ *Id.*

¹¹ MICHAEL P. SCHARF, BALKAN JUSTICE 133, 153 (1997).

¹² *Judgement, supra* note 1, at IV. Evidence, para 14. *See also*, Felde, *supra* note 4 at B9.

¹³ *Judgement, supra* note 1, at IV. Evidence, para 14.

¹⁴ *Id.* at VI. Plea Agreement, para 18(a).

¹⁵ *Id.* at IX. Penalty, para 23.

¹⁶ *Id.* at V. Application of the Law to the Facts, para 18 (claiming Erdemovic's testimony contributed to the decision to issue international arrest warrant for Radovan Karadzic and Ratko Mladic).

an international criminal tribunal and testified against other war criminals all in exchange for the prosecutor's promise of leniency.¹⁸ The plea was an up-front deal -- a quid pro quo between the prosecutor and the defendant that changed the international prosecution of war crimes forever.¹⁹

Before the case finished, it set other precedents as well. The court would acknowledge that plea-bargaining was "common in certain jurisdictions."²⁰ Further, the court would firmly recognize plea-bargaining for the first time,²¹ and they would take note of the agreement in their sentencing judgment. This agreement purported to bind the prosecutor to recommend a seven-year sentence and drop a charge if the accused pled guilty.²² The tribunal refused to say that the document had any "binding effect on [their] chamber," and denied they were in any way "bound by [the] agreement."²³ Still, Erdemovic's agreement affected the Tribunal's sentence.²⁴ The judges sentenced him to a mere five-year prison term -- two years less than the prosecutor recommended.²⁵ The

¹⁷ SCHARF, *supra* note 11 at 133; VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1996) [hereinafter MORRIS & SCHARF]; *see also*, Felde, *supra* note 4 at B9.

¹⁸ *Judgement*, *supra* note 1, at VI. Plea Bargain Agreement, para 18(a) ("In view of the accused's agreement to enter a plea of guilty to count 2, the Prosecutor agreed not to proceed with the alternative count of a crime against humanity."). The question remains unresolved what would happen if the prosecutor tried to back down on such a promise before an accused pled guilty.

¹⁹ *But see id.* at V. Application of the Law to the Facts, para 16, iv Cooperation with the OTP (claiming the accused cooperated without asking for anything in return).

²⁰ *Id.* at VI. Plea Bargain Agreement, para 19.

²¹ *Id.*

²² *See id.* at VI. Plea Bargain Agreement, para. 18 ("Attached thereto was a plea agreement between the parties, the purpose of which was expressed to be to clarify the understandings of the parties as to the nature and consequences of the accused's plea of guilty."). The agreement recommended a seven-year sentence and dropped the charge of a crime against humanity. *Id.*

²³ *Judgement*, *supra* note 1, at VI. Plea Bargain Agreement, para. 19. In the United States plea agreements are also subject to "court approval"; however it is implicit that the court cannot act to the prejudice of the accused. *See generally*, Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 756 (1998).

²⁴ Plea-bargaining is defined as "[t]he process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval." BLACK'S LAW DICTIONARY 1152 (6th ed. 1990).

²⁵ *Judgement*, *supra* note 1, at IX. Penalty, para 23.

Tribunal confirmed the agreement's not so subtle influence by announcing, "the Trial Chamber has taken [the plea agreement] into careful consideration in determining the sentence to be imposed upon the accused."²⁶

The developments of the Erdemovic case stand in stark contrast to discussions about the tribunal's procedure rules. The tribunal talked about plea bargains and immunity during the negotiations for its procedural rules, and then specifically rejected them.²⁷ The President stated, "[t]he persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts. After due reflection we have decided that no one should be immune from prosecution for crimes such as these, no matter how useful their testimony may otherwise be."²⁸ This statement ignored the difficulty they would later encounter prosecuting these crimes. It discounted how the "collaboration" of one person, like Erdemovic, might provide "details of four incidents of which they did not previously know."²⁹

In reality, the tribunal did not want to be seen cutting deals with vial criminals. Nor could they justify reducing the penalties of people who tortured, sexually assaulted and murdered innocent humans. It was ironic how this perspective obscured the plea-bargain's future value to the tribunal. The judges and diplomats did not foresee how Erdemovic's case would help them deter future atrocities. Nor did they perceive how new evidence would help prosecutors publicly indict major war criminals who were otherwise untouchable. In contrast to the tribunal's expectations, Erdemovic's culpability was much less than they expected, and unlike most criminals, he showed profound remorse for his

²⁶ *Id.* at VI. Plea Bargain Agreement, para 19.

²⁷ SCHARF, *supra* note 11, at 67; MORRIS & SCHARF, *supra* note 17, at 112.

crimes.³⁰ Under these conditions, the tribunal would soon be compelled to accept the otherwise unthinkable.

The tribunal rejected plea-bargaining for other reasons too. One primary rationale can be seen in the fundamental purposes of the Nuremberg Charter and Judgments passed down to the Yugoslavia tribunal. Countries participating at Nuremberg based their trials upon the principle of individual responsibility.³¹ Nuremberg hoped that by holding individual perpetrators responsible, they would relieve the collective national guilt.³² They wanted to remove the blame cast upon nations, forcing survivors to condemn individual perpetrators for the atrocities.³³ No doubt, Nuremberg intended its verdicts and its methods to contribute to lasting peace among the warring countries. This too seemed an essential purpose for Yugoslavia, whose warring factions divided along racial and ethnic lines. Ironically, the tribunal would promote both accountability and peace through plea-bargaining.³⁴

Clouded by these Nuremberg perceptions, the Yugoslavian tribunal found it hard to accept any concept perceived as diminishing personal responsibility. They believed injecting plea-bargaining into the trial process would do just that. Agreements could ostensibly deal away individual responsibility. They would give lighter sentences not based upon merit, but rather on bargain.³⁵ Any agreement would lower the penalty for

²⁸ SCHARF, *supra* note 11, at 67

²⁹ *Judgement*, *supra* note 1, at V. Application of the Law to the Facts, para 16, iv Cooperation with the OTP.

³⁰ *Id.*; Felde, *supra* note 4, at B9.

³¹ Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2033 (1998).

³² *Id.*

³³ *Id.* *Judgement*, *supra* note 1, at VII. Sentencing Policy of the Chamber, para. 21.

³⁴ The tribunal acknowledged that Erdemovic's plea would be "important for encouraging other suspects or unknown perpetrators to come forward." It found, "truth cleanses the ethnic and religious hatreds and begins the healing process." *Judgement*, *supra* note 1, at VII. Sentencing Policy of the Chamber, para. 21.

³⁵ SCHARF, *supra* note 11, at 67.

individual crimes in exchange for some non-concrete benefit to society as a whole, such as a possibly less costly trial or the possibility of convicting another criminal. It seemed too high a price to pay at the time. They were not forewarned how enticing the benefit to society could be and how pitiful an accused might appear. Yet in time, the tribunal would accept plea-bargaining to achieve their goals, and they would also come to see how it could promote justice.

It took a compelling case to make this shift in thinking. Erdemovic was the essence of a sympathetic character. He, himself was, after all, somewhat of a victim of circumstances -- forced to commit a crime he abhorred. The tribunal was so moved by the facts of his case that they finally sentenced him to fewer years than both he and the prosecutor had agreed upon. It seems everyone involved felt the tribunal had rendered the right punishment. Still some might question whether this was the right procedure to use and whether plea-bargaining was necessary or legal at all.

This article explores these issues in the context of international law. It questions whether the procedure of plea-bargaining is proper for international tribunals. Specifically it looks to see if there is any basis in international law for applying plea-bargaining to international tribunals. It questions whether or not the unique circumstances of international tribunals make plea-bargaining well suited for international trials. Finally, it inquires how plea-bargaining may help or hinder the tribunal to reach its goals. As a foundation for further discussion, the article first discusses how international law develops.

II. BACKGROUND

International law comes from a variety of sources. Much derives from international agreements or treaties.³⁶ Some comes from the custom of the international community,³⁷ or from general principles of law, which are “common to major legal systems of the world.”³⁸ This last type, where not also adopted from international custom or found in treaty, normally only augment international law when suitable. The common theme to all these different sources of international law is the common consent of nation states.³⁹ This is the basis of all international law.⁴⁰

The Restatement (Third) of The Law of Foreign Relations Law of the United States [hereinafter *Restatement*] clarifies what is meant by customary international law. A law by custom must be the “Practice of states” . . . includ[ing] diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy.”⁴¹ This is not all. The practice must also be both “general and consistent,” to acquire the full mantle of international customary law.⁴² A wide number of important⁴³ states must use it

³⁶ Vienna Convention on the Law of Treaties, May 23, 1969, HeIn’s No. KAV 2424, Senate Treaty Doc. No. 92-1.

³⁷ Statute of the International Court of Justice annexed to the Charter of the United Nations, art. 38, para. 1, 59 Stat. 1055, T.S. 993, 3 Bevans 1153 [hereinafter ICJ Statute].

³⁸ RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986): *See generally*, COMMENTARIES ON THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1992)[hereinafter COMMENTARIES]. To apply the procedure or evidentiary aspects of circumstantial evidence an International Court of Justice stated “. . . indirect evidence is admitted in all systems of law.” *Cofu Channel Case*, [1949] I.C.J. 18.

³⁹ U.S. DEP’T OF ARMY, PAM. 27-161-1, INTERNATIONAL LAW: THE LAW OF PEACE, para 1-6 (1 Sept. 1979)[hereinafter LAW OF PEACE].

⁴⁰ *Id.*

⁴¹ RESTATEMENT § 102 comment b.

⁴² *Id.* § 102(2).

⁴³ The more important the country, the more significant the impact on the rule. *See* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 A.J.I.L. 238, 249 (1996).

(widely accepted).⁴⁴ As more countries follow a practice, they develop consensus on the rule.⁴⁵ Customary law no longer requires a long period of practice.⁴⁶ Still rules practiced for long periods are better argued as customary law. Finally, these new laws become binding only when nations act out of a sense of legal duty to the custom.⁴⁷ They must believe that following the custom is their legal obligation (*opinio juris sive necessitatis*).⁴⁸ Certainly the more a country consistently applies a rule (extensively practices it) within their own country, the more they confirm the rule binds them as a matter of law.⁴⁹

Left unanswered is what amount or type of evidence converts a practice or a general principle of law common to nations into international law. Judgments from international judicial tribunals evidence some recognition of a rule.⁵⁰ National courts that rule on international issues help confirm the law's acceptance.⁵¹ These decisions verify general agreement to such rules by the nation assenting itself. What scholars write and say about the subject also influences whether a principle gains status as international law.⁵² Finally, what states declare in articulating international rules, not significantly disputed by others, denotes international law.⁵³ Still the law remains ambiguous about how many proofs are required before conversion to international law occurs.

⁴⁴ *Id.* § 102 comment b.

⁴⁵ "[S]tates rarely agree unanimously as to the rules of international law: consensus generally occurs with respect to rules that were already well-established." ANTHONY D'AMATO, *INTERNATIONAL LAW ANTHOLOGY* 70 (1994)

⁴⁶ *RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102, reporters' n.2 (1986).

⁴⁷ *Id.* § 102(2) and comment d.

⁴⁸ *Id.*

⁴⁹ Meron, *supra* note 43, at 247.

⁵⁰ *RESTATEMENT* § 103: ICJ Statute, *supra* note 37, art. 38, para. 1(d);

⁵¹ *LAW OF PEACE*, *supra* note 39, at para. 1-8

⁵² *Id.* at para. 1-9

⁵³ *RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 103 comment c (1986).

Even if a general principle, common in major legal systems, is not customary law or part of an international agreement, it may be used for supplementary rules.⁵⁴ For example, general principles have been used for rules about the "administration of justice" such as *res judicata*.⁵⁵ They may also apply as "rules of reason."⁵⁶ Examples would be the rules of acquiescence or estoppel.

Another factor that influences acceptance of a general principle in international law is the development of categories of international law.⁵⁷ Today with the substantial body of human rights law, one may argue credibly that rules against torture are principles common to all major legal systems and a part of that human rights law.⁵⁸

Sometimes international law develops from international government organizations much like United States Administrative Law is created by executive agencies.⁵⁹ Obviously this type of law is seen as a secondary or inferior source.⁶⁰ An international agreement, charter, or constitution may grant power to the organization to write rules or adopt binding resolutions.⁶¹ These rules when promulgated become international law binding, the parties. Perhaps the clearest example of this type of international law can be found in the United Nations Charter and the resolutions of its Security Council.⁶² Few credible sources would argue that these resolutions do not bind United Nations members. Still, such rules

⁵⁴ *Id.* § 102(4).

⁵⁵ *Id.* § 102 reporters' n.7.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Charter of the United Nations, art. 41, 59 Stat. 1055, T.S. 993, 3 Bevans 1153 [hereinafter U.N. Charter] (Security Council decides measures to use (not armed force) to respond to threats to the peace, and may call upon member nations to apply the measures).

⁶⁰ RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment g (1986).

⁶¹ U.N. Charter, *supra* note 59, art. 2 & 94.

⁶² *Id.*

are limited because they only apply to member nations.⁶³ Only those who have signed the charter or constitution of the international organization in question have the duty to comply.

Moving from the discussion of general international law, the paper focuses on more narrow issues. One primary purpose of this paper is to explore how plea-bargaining assists international criminal tribunals. A discussion of the purposes behind international criminal tribunals lays the footing for the paper's exploration of war crimes plea-bargains.

The goals of International Criminal Tribunals vary, but there are common themes. Many aims come from the special circumstances of international conflict or war. Others draw from the unique impact war crimes impose on other nations. Most of the goals are similar to those of domestic criminal courts, but on a larger scale. The discussion following describes the more commonly stated goals for War Crimes Tribunals.⁶⁴

First on the list is deterrence.⁶⁵ International criminal trials catch the attention of the world at large. Their proceedings are covered in the global press, and those convicted become notorious worldwide. One need only look to the many Nuremberg defendants as an example, or in our modern day to the major leader only indicted by the Yugoslavian Tribunal (Radovan Karadzic or Ratko Mladic). These indictments have led some to

⁶³ COMMENTARIES, *supra* note 38, at 18.

⁶⁴ Alvarez, *supra* note 31, at 2031-2033; James Djoursey, *International Human Rights*, 31 INT'L LAW. 659 n. 4 (1997).

⁶⁵ See Kofi Anna, Statement by the United Nations Secretary-General at the adoption of the Statute for the International Criminal Court, 18 July 1998 (visited Nov. 11, 1998) <<http://www.un.org/icc/speeches/718sg.htm>>

believe that the primary purpose of a war crimes tribunal is to stop future violations of the law of war.⁶⁶

A second reason can be restitution.⁶⁷ States desire to compensate victims for injustice. A tribunal can help to identify remains, restore lost property, and otherwise help heal wounds.⁶⁸ Even though tribunals may not restore lives or homes they can restore a measure of individual peace. They may remove or limit survivors' fears of further reprisal by confining the criminals. Detention of criminals allows surviving victims and witnesses to release their fear of immediate reprisal. They feel safer and freer to continue their lives. It becomes easier for them to return to normal. This benefit to witnesses and survivors is partially a by-product of another important tribunal purpose -- punishment.

To impose punishment upon the guilty is a major purpose of international criminal tribunals.⁶⁹ These courts punish evil. They penalize the atrocity and make sure bad acts, like murder, rape and torture have consequences. They insure that criminals do not benefit from their crimes. Clearly, punishment furthers the previously discussed aim of deterring crimes.

⁶⁶ Former Chief Prosecutor for ITCY stated: "There's only one way to stop criminal conduct in any country. That's not having sentence, not even the death sentence. If would --be criminals THINK they're going to be caught and punished then they're going to think twice." Johnathan Power, *Argument for a Word Criminal Court*, NEW STRAITS TIMES, June 20, 1998 (A western viewpoint) at 10 (Malaysia). "It is important, of course, to bring small-fish war criminals to trial -- the actual perpetrators of these gruesome acts. Perhaps when the next Bosnia happens somewhere else in the world, similar small fish will think twice before engaging in such activities. But that argument applies in even grater measure to those who instigate and inflame such conflicts in the first place." Felde, *supra* note 4, at B9.

⁶⁷ "I express the hope that this judgement will contribute to the long-term process of national reconciliation in Rwanda. For there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and the rule of law." Kofi Annan, *Secretary-General Welcomes Rwanda Tribunal's Genocide Judgement As Landmark In International Criminal Law*, Sept 1998 (visited Mar. 24, 1999) < <http://www.un.org/News/Press/docs/1998/19980902.sgsm6687.html> >.

⁶⁸ W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INT'L L. 175, 176 (1995).

⁶⁹ Djoursey, *supra* note 64, at 659 n. 4.

Punishment also dovetails well with retribution, a critical purpose of international criminal trials. Hopefully, retribution from the tribunal serves to satisfy the victims' thirst for revenge.⁷⁰ Victims get needed psychological relief.⁷¹ Proper retribution ought to remove the cry for vengeance. The retribution taken by a tribunal can relieve anger and hate. By removing hate, retribution prevents future wars otherwise caused by one group taking revenge on the other.⁷² Retribution should end this need for reprisal. Properly used, retribution helps the country break out of the cycle of war and violence. The aim of retribution should be to reduce the risk of future war.

Assigning individual responsibility for war crimes and providing punishment to remove collective guilt can be another important tribunal purpose.⁷³ As discussed earlier, this was a major goal of the Nuremberg Tribunal.⁷⁴

A more obscure purpose behind tribunals is collecting and preserving an accurate collective memory of the atrocities for history.⁷⁵ This goal arguably has the greatest effect on future generations. Even today evidence collected from World War II remains to remind society of the terrible nature of this war's atrocities.

All of these goals are interrelated in one way or another. The line separating them can stretch very thin. Yet each one has a key role to play in the establishment and functioning of international tribunals. As this paper will demonstrate, plea-bargaining assisted the Yugoslavian tribunal in achieving these purposes.

⁷⁰ Alvarez, *supra* note 31, at 2032.

⁷¹ *Id.*

⁷² *Judgement, supra* 1, at VII. Sentencing Policy of the Chamber, para 21.

⁷³ Alvarez, *supra* note 31, at 2033.

⁷⁴ *Id.* at 2032.

⁷⁵ *Id.*

III. THE PLEA-BARGAIN AS A PRINCIPLE OF INTERNATIONAL LAW

This discussion will show that contrary to ordinary expectation, plea-bargaining has become widely accepted and extensively applied. The procedure is practiced currently in the United States,⁷⁶ the Philippines,⁷⁷ Israel,⁷⁸ Canada,⁷⁹ and the United Kingdom⁸⁰ as well as other former colonies of the United Kingdom.⁸¹ Surprisingly, plea-bargaining has taken root in Europe and countries with inquisitorial legal systems.⁸² Such countries embracing the concept in one form or another include the two major European powers -- Italy and Germany.⁸³ There are also signs plea-bargaining may be taking hold in Asia.⁸⁴ Even the Japanese arguably practice the procedure in a modified form.

⁷⁶ Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753 (1998).

⁷⁷ *Amatan v. Aujero*, No. RTJ-93-956 PHLIPP, PHL SCT, Philippine S. Ct. (1995)

⁷⁸ The State of Israel, Proposed Statutes, No. 2374 (27.2.1995) 360 (5755-1995) (visited Mar. 16, 1999) <<http://wings.buffalo.edu/law/bclcl/iplea.htm>>.

⁷⁹ HEDIEH NASHERI, *BETRAYAL OF DUE PROCESS; A COMPARATIVE ASSESSMENT OF PLEA BARGAINING IN THE UNITED STATES AND CANADA* (1998); Peter Boisseau, *Global Resolution: The International Plea Bargain That Put Away Alan Eagleson*, 22 CANADIAN LAWYER 24(5) (1998); R. Kuszelewski & D.L. Martin, *The perils of Poverty; Prostitutes Rights, Police Misconduct, Poverty Law*, 35 OSGOODE HALL L.J. 835, 856 (1997) (complaining about lenient plea-bargain).

⁸⁰ Michael Zander, *Plea Bargaining Goes Back a Hundred Years*, 148 NEW LAW JOURNAL 323 (1998)(United Kingdom); Mike McConville, *Plea Bargaining: Ethics and Politics*, 25 JOURNAL OF LAW AND SOCIETY 562 (1998)(United Kingdom).

⁸¹ B.E. D'silva, *Resembled a Plea Bargain*, 3 NEW ZEALAND LAW JOURNAL 61 (1980 Kenya); *Plea Bargaining in the United States of American and South Africa*, 29 COMPARATIVE INTERNATIONAL LAW JOURNAL OF SOUTH AFRICA [COMP & INT'L L.J.S AFR] 168 (1996); Jeremy Thorpe, *Determining the Appropriate Role for Charge Bargaining in Part IV of the Trade Practices Act*, 4 Competition & Consumer Law Journal 1 (1996) (Australia); DONNA SPEARS, *SENTENCING INDICATION HEARINGS PILOT SCHEME* / DONNA SPEARS, PATRIZIA POLETTI, IAN MACKINNEL (Judicial Commission of New South Wales 1994) (Australia); Robyn Lansdowne, *Infanticide: Psychiatrist in the Plea Bargaining Process*, 16 MONASH UNIVERSITY LAW REVIEW 41 (1990) (Australia).

⁸² Some question whether Holland is using plea-bargaining. M. HIDEBRANDT, P.T.C. KAMPEN AND J.F. NIJBOER, *PLEA BARGAINING IN HOLLAND?* (Arnhem: Gouda Quint, 1994).

⁸³ Hele A. Haglich, *A Comparison of Guilty Plea Procedure in the United States and Germany*, 10 DICKINSON JOURNAL OF INTERNATIONAL LAW 93 (1991); Jeffrey J. Miller, *Plea Bargaining and Its Analogues Under the New Italian Criminal Procedure Code and in the United States: Towards a New Understanding of Comparative Criminal Procedure*, 2 N.Y.U. J. INT'L L. & POL. 215 (1990).

⁸⁴ *Lawyer Yi Denies Alleged Plea Bargaining With Prosecution*, Seoul The Korea Herald (Internet version) (visited Mar. 16, 1999) <<http://wnc.fedworld.gov/cgi-bin/re...xi38&CID=C133148193359575121603650>>.

During the 1970s, Italy faced an ever-growing backlog of criminal cases.⁸⁵ The Country sought a cure for the problem through Parliament. During this time, Italy regularly granted amnesty for certain classes of defendants by parliamentary decree.⁸⁶ With no end in sight, Italy looked outside its borders for a more permanent solution. In 1981 they took the first step to create a statutory trial avoidance system. While Italy referenced the U.S. plea-bargain, what they instituted was substantially different.⁸⁷ The new form of plea-bargaining introduced had more in common with the United States military's system of Non-judicial punishment than actual plea-bargaining.⁸⁸ It allowed the defendant to waive certain rights in return for lower punishment. For example an accused might waive the constitutional right of trial.⁸⁹ Acceptance did not admit guilt.⁹⁰ The accused was still free to protest innocence.

It was not until 1989, when Italy drew up a new code based upon the accusatory system, that the Country fully implemented plea-bargaining.⁹¹ Articles 444 and 445 of the new Penal Code gave the parties to an Italian criminal trial a chance to agree on a punishment.⁹² The parties could now present this agreement to the judge and request a certain form of punishment. The amount a prosecutor could diminish a sentence through bargaining had limits.⁹³ Italians named the new procedure "patteggiamento", their word

⁸⁵ Rachel A. Van Cleave, *An Offer You Can't Refuse? Punishment Without Trial In Italy and the United States: The Search for Truth and an Efficient Criminal Justice System*, 11 EMORY INT'L L. REV. 419, 430 (1997).

⁸⁶ *Id.*

⁸⁷ *Id.* at 431.

⁸⁸ UCMJ art. 15 (1998).

⁸⁹ Van Cleave, *supra* note 85, at 430. Other rights that might be waived included the presumption of innocents, the right to present a defense, or the right to be tried by a judge. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 439 n.90.

⁹² *Id.* at 442 to 443.

⁹³ *Id.* at 441.

for bargain.⁹⁴ With some minor changes “patteggiamento” continues to play an important role in Italian justice.⁹⁵

During the time Italy introduced plea-bargaining, Germany was incorporating the procedure into its criminal legal system. It is estimated that Germany began making plea agreements in the 1970s.⁹⁶ As of 1992 German plea-bargaining was common practice.⁹⁷ The procedure came in spite of the fact that haggling over cases was “considered repugnant.”⁹⁸ One German scholar renounced the practice, demonstrating this repugnance.⁹⁹ This author felt so strongly that he made public statements denying the practice.¹⁰⁰ Whether he knew it or not at the time, plea-bargaining was in full swing.¹⁰¹ The practice is fully accepted today.¹⁰²

Germany’s plea-bargain strikes some contrast to that of the United States.¹⁰³ In Germany there is no guilty plea. That means pleading guilty cannot become the central issue of the defendant and prosecutor’s bargain. Still, the German system has remarkable resemblance to the United States’ system.¹⁰⁴ In both nations, for example, the parties negotiate for an upper limit on punishment.

⁹⁴ *Id.*

⁹⁵ See generally William T. Pizzi and Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT’L L. 1 (1992); Van Cleave, *supra* note 85, at 419, 419-30.

⁹⁶ Joachim Herrmann, *Bargaining Justice – A bargain for German Criminal Justice?* 53 U. PITT. L. REV. 755 (1992).

⁹⁷ See *id.* at 756.

⁹⁸ *Id.* at 755.

⁹⁹ Markus Dirk Dubber, *American Pleas Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 549 (1997).

¹⁰⁰ *Id.* at 594.

¹⁰¹ *Id.* at 548-549.

¹⁰² Herrmann, *supra* note 96, at 756.

¹⁰³ *Id.* at 757.

¹⁰⁴ See generally *id.*; Dubber, *supra* note 99, at 547.

There are other similarities as well. The accused must participate not just counsel.¹⁰⁵ Defense counsel must inform the client what the other side has offered.¹⁰⁶ Finally, bargaining often centers on obtaining the accused's confession.¹⁰⁷

During this same time, Asian countries such as Japan began using procedures with aspects similar to those embraced in Italy and Germany. Japan denies the practice of plea-bargaining much like Germany did in the 1970s.¹⁰⁸ Nevertheless, Japanese law gives the prosecutor broad authority to "consider the accused's "personality, age, environment, seriousness and the circumstances of the crime" or whether the prosecution "has become unnecessary because of a change in the post-crime circumstance.""¹⁰⁹ This open discretion given to prosecutors to drop charges or whole cases based upon "change in the post-crime circumstance" called "kiso bengi shugi"¹¹⁰ leaves much reason to suspect under the table plea agreement.

This open discretion led one author to write an article speculating, though unsubstantiated, that plea-bargains occur secretly in Japan.¹¹¹ At least two Japanese cases

¹⁰⁵ Herrmann, *supra* note 96, at 757.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 763.

¹⁰⁸ See Jean Choi Desombre, *Comparing the Notions of the Japanese and the U.S. Criminal Systems: An Examination of the Pretrial Rights of the Criminally Accused in Japan*, 14 UCLA PAC. BASIN L.J. 103, 123 (1995).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Marcia E. Goodman, *The Exercise and Control of Prosecutorial Discretion in Japan*, 5 UCLA PAC. BASIN L.J. 16 (1986) (raising the possibility of under-the-table plea bargains) *quoted in* Desombre, *supra* note 108, at 125 n.104. *But see*, Daniel H. Foote, *Prosecutorial Discretion in Japan: A Response*, 5 UCLA Pac. Basin L.J. 96, 100 (1986) (showing that the difference in the Japanese cultural makes it more likely the accused is "throwing himself on the mercy of he prosecutor"), *quoted in* Desombre, *supra* note 108, at 125 n.104.

of plea negotiations have been documented, but Japanese legal scholars dismiss them as special circumstances.¹¹²

While open plea agreements are not recognized, still Japan's use of "kiso bengi shugi" may be very similar to plea-bargaining. The prosecutor may choose not to prosecute the case for reasons that occur after the crime such as cooperation with police. In principle, "benevolence" for cooperation seems much akin to America's plea-bargaining. Plea-bargaining in America too often procures new criminal evidence. One can find striking similarity between the two systems by considering more subtle facts. Certainly, the Japanese accused may predict or has some assurance what the prosecutor's action will be for the assistance.¹¹³

Recognizing plea negotiations in some form occur in Europe and possibly Asia, we must determine how extensive and widespread the practice may be. If plea-bargaining is extensively used within the jurisdictions practicing it, one can argue more credibly that plea-bargaining is a part of international law.

Plea-bargaining in the United States dwarfs bargaining in Germany. One study claims that 92 percent of all United States cases are managed through guilty pleas.¹¹⁴ Not all of these guilty plea cases come from plea agreements, but one can speculate a great many of them use some bargaining. German plea-bargains number much less. Estimates show that Germany plea-bargains roughly twenty to thirty percent of its cases.¹¹⁵

¹¹² Desombre, *supra* note 108, at 125 n.105.

¹¹³ *Id.* at 124 n.101.

¹¹⁴ U.S. Dept. of Justice, Office of Justice Program, Bureau of Justice Statistics, SOURCE BOOK OF CRIMINAL JUSTICE STATISTIC 530 (1993) [hereinafter JUSTICE STATISTICS] (88.5 % of federal convictions came from guilty pleas).

¹¹⁵ See Herrmann, *supra* note 97, at 756.

Combining the bargaining of the United States and Germany reveals that bargaining is extensive in these jurisdictions. They amply practice the procedure. The United States definitely takes the lead. German plea-bargaining, though behind in numbers, is substantial nevertheless.

Any reader can see that the practice of plea-bargaining has become more widespread than first believed. Europe and Asia's acceptance of plea-bargaining or like procedure support this changed view. Germany's open acknowledgment of the plea-bargaining practice only further confirms that position. The extensive use of plea-bargaining in just two of these jurisdictions demonstrates how pervasive the practice has become. Yet some doubts about its universal acceptance still persist.

Legal authors have persistently argued that plea-bargaining comes from the adversarial system.¹¹⁶ Germany's legal system developed out of an inquisitorial tradition rather than an adversarial one. For years, Germany has been developing plea-bargaining. Their use of the procedure dispels the argument that agreements are limited to adversarial legal systems. It confirms that inquisitorial based legal systems can embrace plea-bargaining as well. Germany's acceptance of the procedure opens the possibility that many more inquisitorial systems will soon join the ranks. That is, if they have not done so already.

Finally, one might question whether plea-bargains occurring worldwide today amount to the *Restatement's* "common to major legal systems of the world" standard. Perhaps plea agreements are not as extensive and widespread as rules like estoppel or *res*

¹¹⁶ See Van Cleave, *supra* note 85, at 460.

judicata. Still one cannot ignore their growing significance. The procedure's significance must especially be recognized in light of recent developments at the ITCY.

A defendant might argue that when the International War Crimes Tribunal for the Former Yugoslavia (ITCY) accepted plea-bargaining in the Erdemovic case, it pronounced the procedure legitimate.¹¹⁷ According to the *Restatement*, these Judges have created a binding rule of criminal procedure for this Tribunal.¹¹⁸ This judgment is at least akin to the opinions of notable legal scholars. It may even simply confirm the customary international nature of the procedure. Future tribunals founded by the United Nations will not easily deny an accused the right to plea-bargain. Not surprisingly, the proposed International Criminal Court has already addressed the issue following the ITCY tradition.¹¹⁹ The acceptance of the procedure in the ITCY and the lack of any protest by United Nations members may imply acceptance.¹²⁰ In the final analysis, the Erdemovic case only boosts the argument that the plea bargain is a part of international law.

One final point to consider about the plea-bargaining. This procedure may have a place in war crime trials even if not as customary international law or as a general principle of major legal systems. Tribunals may apply plea-bargaining as an "administrative rule" or

¹¹⁷ *Judgement*, *supra* note 1, at VI. Plea Bargain Agreement. This occurred despite the fact that the tribunal originally renounced plea agreements. *Id.*

¹¹⁸ RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986).

¹¹⁹ Int'l Crim. Ct. Stat., art. 56, para. 5 U.N. Doc. A/CONF.183/9 (visited Mar. 23, 1999).

<<http://www.un.org/law/icc/statute/romefra.htm>> [hereinafter I.C.C. Statute]. This paragraph states, "Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court." That was the same position ITCY took in Erdemovic suggesting an implied acceptance. See *supra* note 23, and accompanying text.

¹²⁰ "Although customary law may be built by acquiescence as well as by the actions of states (Comment b) and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures." RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment d (1986). See also *North Sea Continental Shelf Cases* [1969] I.C.J. Rep. 3, 43.

a “rule of reason.” With this final point in mind, the Article now turns to the question of how plea-bargaining helps War Crimes Tribunals get their work done.

VI. THE NEED FOR PLEA BARGAINING IN THE INTERNATIONAL CRIMINAL TRIBUNAL

Most of the challenges faced by War Crimes Tribunals are similar to those faced by domestic criminal prosecutions. The evidence needs collection and preservation in a reliable way. Investigators must interview witnesses and prosecutors must call them at trial. Prosecutors must arrange travel and pay expenses. Costs can spiral out of control.¹²¹ These challenges multiply in the international and wartime arena. Traveling over international borders increases the complexity of getting witnesses. Distant travel compounds the amount of time required to move witnesses.

These concerns do not include the more subtle roadblocks to prosecutions like witness intimidation or destruction and deterioration of evidence. All of these less visible challenges become exacerbated in war’s context. Certainly witness are more threatened by rape, murder and torture wreaked by a military body than they are by one person acting in an individual role. Without question, evidence gets destroyed or deteriorated while war drags onward.¹²² Investigators are denied access to crime scenes for months or even years. By the time investigators gain access, much proof is lost and memory faded. From this context one can see that any tool discovering evidence or simplifying the effort ought to be employed.

¹²¹ Report to the Chairman, Committee on Foreign Relations, U.S. Senate, *Former Yugoslavia – War Crimes Tribunal’s Workload exceed capacity*, (WESTLAW through GAO/RPT) 1998 WL 442661 (F.D.C.H.) [hereinafter GAO Report].

¹²² The difficulty of prosecution will be magnified in ICC prosecutions that will likely proceed in the face of continuing war. ICC Statute, *supra* note 119, art. 1 (Stating courts continual jurisdiction).

This article now explores how the plea-bargain both simplifies prosecution and produces more convictions. It views simplifying the process from the perspective of funding first. It then explores how guilty pleas help obtain and protect witnesses. The article next looks at how plea-bargains assist in collecting evidence. Finally, it shows how these agreements overcome the power of rogue states to thwart prosecution of their own leaders.

Expense troubled the Yugoslavian Tribunal from its beginning.¹²³ At its first meeting in 1993 the Tribunal had “four secretaries, a few computers, and the U.N. had rented a meeting room and three small offices in the Peace Palace. The rent was paid for two weeks.”¹²⁴ This meager existence continued for some time. In 1994 when Richard Goldstone took over as the prosecutor, the tribunal had a meager, though more substantial, budget of \$32 million dollars.¹²⁵ These funding woes caused Justice Goldstone to remark “The Tribunal has been the child of an insolvent parent, with all the consequences that has.”¹²⁶ Even with more money, most of it went to pay salaries and rent.¹²⁷ Only a small portion was allocated for the important work of investigation.¹²⁸ All this time, the clock was running, physical evidence vanishing, and witnesses dying or forgetting indispensable facts. In the initial stages of the Yugoslavia Tribunal when most of essential work begged to be done, the money was not available. Cost savings that come from plea-bargains

¹²³ GAO Report, *supra* note 121.

¹²⁴ William Horne, *The Real Trial of the Century*, THE AMERICAN LAWYER at 5 (Sep 1995).

¹²⁵ Report of the Secretary-General as Requested by the General Assembly in Resolution 48/251, U.N. Doc. A/C.5/49/42, Dec. 5, 1994 (visited Mar. 29, 1999) <[gopher://gopher.un.org/00/ga/docs/49/c5/42](http://gopher.un.org/00/ga/docs/49/c5/42)> [hereinafter Secretary Report] (This amount would be increased latter).

¹²⁶ SCHARF, *supra* note 11, at 84

¹²⁷ Secretary Report, *supra* note 125.

¹²⁸ *Prosecute Bosnia's War Criminals*, N. Y. TIMES (Jan. 4, 1995) at A18.

would help alleviate the money crunch during this critical period.¹²⁹ More money could then be diverted from the judicial aspects of the tribunal and put into essential investigations.

The General Accounting Office documented the exponentially increasing cost of the ITCY investigations and trials.¹³⁰ Even though the tribunal's budget skyrocketed, the GAO still contended in 1989 that the tribunal did not have sufficient resources to "handle its current workload," and they projected that, "the problem is likely to get worse."¹³¹ Specifically, the Office of the Prosecutor had allocated "almost 60 percent of its investigative resources" to trials.¹³² This forced them to suspend field investigations.¹³³

For an example of the significance of savings from plea-bargaining, one need only look at the United States. Plea-bargaining in the United States saves sizable resources annually. When an accused pleads guilty, the prosecutor avoids the expense of a fully litigated jury trial.¹³⁴ To compute the annual amount, one simply multiplies the price of a jury trial by the number of guilty pleas (92 percent of all cases).¹³⁵ Bargains did not produce all of the guilty pleas, but they accounted for a substantial portion. In the United

¹²⁹ One article in the United States showed how much was being saved by plea-bargains. When a ban was instituted on plea agreements, the number of cases doubled and they were vastly more complex. Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265, 277 (1987).

¹³⁰ "[T]he tribunal has grown from an organization with 11 judges and an approved budget of \$500,000 to an approved staff level of 571 with a budget of almost \$70 million." GAO Report, *supra* note 122, at 5.

¹³¹ *Id.* at 8.

¹³² *Id.* at 11.

¹³³ Investigating genocide means sorting through evidence on thousands of victims and collecting evidence from thousands of bodies. Once the evidence is collected it must be sorted, translated, processed and analyzed. According to the GAO, prosecutors have processed less than half of the information collected by the ITCY by the end of 1997. *Id.* at 15.

¹³⁴ See generally Weninger, *supra* note 129, at 265, 265-77.

¹³⁵ JUSTICE STATISTICS, *supra* note 114, at 530.

States alone, the savings are staggering. All of these judicial resources may then be employed on more pressing matters.

In war crimes, the cost of individual trials is much greater than for an average U.S. jury trial.¹³⁶ It only makes sense from the perspective of judicial efficiency to employ plea agreements.

Beside the issue of cost stands the daunting task of bringing witness to a war crimes trial.¹³⁷ Because war crimes in Yugoslavia were ethnic, survivors sometimes fled the country.¹³⁸ Having had their homes destroyed, their family and friends killed, it became an extreme task to find them. Many survivors of the ethnic cleansing sought refuge in other countries.¹³⁹ They literally scattered. Others could not recognize crime scenes after war devastated them. To find witnesses, the Yugoslavian Tribunal had to employ many international detectives.¹⁴⁰

Once the tribunal found a witness, they had to insure their safety.¹⁴¹ For some this meant the tribunal had to maintain their anonymity to the outside world. For others, the tribunal would shield their identity from the accused¹⁴². When Presiding Judge Gabrielle McDonald of the ITCY finally guarded the identity of one witness from the defense, she

¹³⁶ SCHARF, *supra* note 11, at 79 – 84; Telephonic interview with CPT James Gillespie, Team 1 Investigations, International Criminal Tribunal for the Former Yugoslavia, in Washington D.C. (Nov. 20, 1998)[hereinafter Interview].

¹³⁷ Interview, *supra* note 136.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ One example of protection offered came during the Dusko Tadic trial. To protect the identity of witnesses “the public gallery was cleared the blinds were lowered, and the court launched into its first closed-door session to protect the identity of a witness, identified only as witness “P”” It later turned out to be Drazen Erdemovic. SCHARF, *supra* note 11, at 68, 108 and 133.

¹⁴² *Id.* at 68.

commented it was the toughest decision she had ever made.¹⁴³ She had to weigh the safety of the witnesses against a fair and just trial for the accused.¹⁴⁴ The Judge realized that a defendant could not adequately assist in his defense if he did not know the witnesses against him. Even with all these extraordinary protections, still fearing reprisal, some witnesses refused to testify.¹⁴⁵

For those who would testify, the prosecutors began the task of getting passports and transporting them to The Hague. Time was of the essence; everything was needed urgently and so prosecutors obtained everything at the highest cost¹⁴⁶. During a trial once they found a witness, the prosecution brought them to the Tribunal within 48 hours.¹⁴⁷ They also provided international airfare, lodging, passports, and money for expenses while testifying.¹⁴⁸

From the perspective of the Erdemovic case, the tribunals totally avoided them these challenges. His agreement and guilty plea required no witness testimony.¹⁴⁹ The tribunal saved imposing on witnesses the pain and fear of testifying. There was no grueling cross-examination – certain to occur with live witness testimony. The fragile lives of victims now could mend knowing the Tribunal dispensed justice without traumatizing them. Lastly, the tribunal saved the time and money normally spent to locate and bring witnesses to The Hague. Because of the Erdemovic plea-bargain, these resources could be channeled to other important cases.

¹⁴³ *Id.*

¹⁴⁴ *Id. at 108.*

¹⁴⁵ Interview, *supra* note 136

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Judgement, supra* note 1, at II. The Guilty Plea, para. 2 and IV. Evidence, para 13-14.

The Erdemovic case had a more far reaching effect. This guilty plea bestowed some of the benefits just discussed on the tribunal again during the Rule 61 hearing for Radovan Karadzic and Ratko Mladic.¹⁵⁰ The paper discusses this type of hearing and its purpose in greater detail later. For now it is sufficient to state that the tribunal easily acquired Erdemovic's testimony for this hearing once the plea agreement was in place.¹⁵¹

Another way plea agreements help war crimes trials is by gathering evidence. This problem looms greater in the international setting than in domestic courts. Governments have attempted to thwart the ITCY from gathering evidence in the former Yugoslavia. As recently as November 1998 FRY announced "the Federal Republic of Yugoslavia does not accept any investigation of ICTY in Kosovo and Metohija generally. . ."¹⁵² Since its beginnings, gathering evidence in a hostile country has been a major roadblock for the tribunal.¹⁵³ Sometimes war criminals use passage of time or delay of investigations as an obstacle. Evidence deteriorates, not to mention that political will diminishes over time. Describing an early delay in the Yugoslavian investigations, the Legal Adviser of the U.S. Department of State said it would have "serious consequences."¹⁵⁴

¹⁵⁰ *Id.* at V. Application of the Law to the Facts, para. 16, iv. Cooperation with the OTP.

¹⁵¹ Transcript of Trial Chambers Hearing, Review of Indictment Pursuant to Rule 61, Radovan Karadzic and Ratko Mladic, Case No. IT-95-18-R61 Case No. IT-95-5-R61, 5 July 1996 (visited Mar. 23, 1999) <<http://www.un.org/icty/transe5/960705IT.txt>> (Testimony of Drazden Erdemovic); Decision of Trial Chamber 1, Review of Indictment Pursuant to Rule 61, Radovan Karadzic and Ratko Mladic, Cases No. IT-95-5-D 16, 16 May 1995 (visited Mar. 29, 1999) <<http://www.un.org/icty/karadzic/decision-e/50516DF1.htm>>.

¹⁵² Press Release to the Media, Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia, The Hague, 5 November 1998 (visited Nov. 20, 1998) <<http://www.Un.org/icc/speeches/718sg.htm>> [hereinafter McDonald Press Release].

¹⁵³ *Id.*

¹⁵⁴ SCHARF, *supra* note 11, at 48.

Without plea-bargains, prosecutors never obtain some evidence. For instance, only other perpetrators survive some crimes. War criminals usually kill all their victims.¹⁵⁵ Without cooperation from other perpetrators, serious crimes go unpunished and criminals roam free. It is not always the small fish who are caught in the plea bargain's net either.

In the United States, prosecutors have employed the power of plea-bargaining against organized crimes leadership with great success.¹⁵⁶ In one of the best examples, prosecutors plea-bargained with a witness to procure the conviction of John Gotti.¹⁵⁷ During the late eighties and early nineties, John Gotti was the notorious head of the Gambino crime family in New York. He had avoided conviction in several trials.¹⁵⁸ Not until the government got evidence on a member of Gotti's organization, Salvatore Gravano did they get the testimony needed to convict.¹⁵⁹ The government turned Gravano to a credible witness against Gotti. In the end it was the testimony of this fellow mobster that helped to finally convict John Gotti.¹⁶⁰ Without this witness, one would speculate a different outcome. The case grew much weaker without this witness. Bargaining in the Gotti case allowed the prosecutor to get the big fish that they otherwise would not have netted. Applying it to war crimes, plea-bargaining can yield equally stunning power and success.

¹⁵⁵ *Judgement*, *supra* note 1, at IV Evidence para.13.

¹⁵⁶ *Convictions Stick to 'Teflon Don'; John Gotti, Boss of the Gambino Crime Family, Faces Life in Prison for 13 Counts of Murder and Racketeer*, Orlando Sentinel Tribune, Apr. 3, 1992, at A1 [hereinafter *Convictions Stick*].

¹⁵⁷ Pete Bowles, *Gotti's Guy Sings a Song of Murder; Ex-underboss: It was kill or be killed*, NEWSDAY, Mar. 3, 1992, at 3.

¹⁵⁸ *Convictions Stick*, *supra* note 156, at A1.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

War atrocities create intense reasons not to testify, just as in organized crime. Usually fear motivates the witnesses' silence.¹⁶¹ Prosecutors can overcome these threats with protection and enticements made during plea negotiations, just as the FBI did with Gravano and the prosecutor did with Erdemovic. The indictments of Radovan Karadzic and Ratko Mladic signal how plea-bargaining can overcome the roadblock war crime prosecutions have in common with organized domestic crime.

Plea-bargaining helps the prosecutor to overcome illegitimate organized power, whether yielded by a mob or a rogue government. At the time of indictment, these two war criminals were still important Serbian national leaders. They roamed the country and still held power and authority. The "rogue" State, the Federal Republic of Yugoslavia (FRY), refused to arrest or prosecute them. The FRY easily commanded the power to destroy or cover incriminating evidence. Ironically, Karadzic and Mladic may have motivated FRY's attempts to forbid further investigations.¹⁶² Plainly, any witness against them that lived in FRY had compelling reasons not to testify. FRY, even today, has effectively cut off the prosecution's attempts at any immediate enforcement against Kardizic and Mladic¹⁶³

Without plea-bargaining one might speculate that Radovan Karadzic and Ratko Mladic would have escaped indictment. On June 26, 1996 the trial of Dusko Tadic recessed to allow a special Rule 61 hearing against these notorious leaders. Rule 61 is known as the "super indictment" procedure.¹⁶⁴ The purpose of a Rule 61 hearing is to

¹⁶¹ SCHARF, *supra* note 11, at 68.

¹⁶² McDonald Press Release, *supra* note 152.

¹⁶³ *Id.*

¹⁶⁴ SCHARF, *supra* note 11, at 68.

assist the Tribunal in making arrests where states refused to hand over suspects.¹⁶⁵

Essentially, it allows a mini trial in absentia.¹⁶⁶ Rule 61's most compelling payoff comes from preserving witness testimony, documentation, physical evidence and video for future use. Political reasons also motivated the rule.¹⁶⁷ Holding the hearing assures victims that work is progressing in the case, and it pressures other governments to act as well.

During the Rule 61 hearing for Karadzic and Mladic, Drazen Erdemovic testified and provided important evidence. Described as the prosecution's star witness, he gave riveting testimony about the crimes.¹⁶⁸ How pivotal his testimony was in obtaining the indictments remains speculation. Still, plea-negotiations can be credited for Erdemovic's important testimony that factored firmly in the decision to indict these two leaders.

Besides the notoriety of the indictment itself, the Rule 61 hearing created another favorable benefit. Nations of the world were seeking peace for the Baltic region. Dayton figured as the best hope for a settlement. Radovan Karadzic and Ratko Mladic both stood as obstacles to any peaceful resolution of the conflict. Because of their indictments, they could not travel outside their own country.¹⁶⁹ Any member of the United Nations would be compelled to turn them over to the Tribunal. Their indictments kept them from

¹⁶⁵ International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 61(E) (visited Mar. 24, 1999) <<http://www.un.org/icty/rev10-e2.htm#61>> (visited Mar. 24, 1999).

¹⁶⁶ International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 61(B) (visited Mar. 24, 1999) <<http://www.un.org/icty/rev10-e2.htm#61>> (visited Mar. 24, 1999).

¹⁶⁷ *Id.*

¹⁶⁸ Transcript of Trial Chambers Hearing, Review of Indictment Pursuant to Rule 61, Radovan Karadzic and Ratko Mladic, Case No. IT-95-18-R61 and Case No. IT-95-5-R61, 5 July 1996 (visited Mar. 23, 1999) <<http://www.un.org/icty/transe5/960705IT.txt>> (Testimony of Drazden Erdemovic).

¹⁶⁹ Conrad K. Harper, *Freiedmann Award Address*, 35 COLUM. J. TRANSNAT'L L. 265, 267 (1997).

attending and scuttling the Dayton peace accord.¹⁷⁰ That fact alone figures significantly in the achievement of peace.

Most important, this plea agreement and the subsequent indictment isolated Karadzic and Mladic. These indictments effectively branded them war criminals. They were now no longer welcome to leadership status among nations. They lost freedom of travel.¹⁷¹ It is conceivable they will live the remainder of their lives like many that fled the justice of Nuremberg -- cut off from the rest of the world. When the indictments imposed seclusion, they inflicted a severe punishment undoubtedly seen by others. It is comforting to know if Radovan Karadzic or Ratko Mladic ever slip-up and leave the country, prosecutors will arrest them. In a surprise move Karadzic may have paid plea-bargaining the ultimate compliment. It was rumored that after his indictment, he explored the possibility of plea-bargaining for himself.¹⁷²

As an aside, whether justice comes now or later in the case of Karadzic and Mladic, plea-bargaining served its purpose. With the evidence obtained from Erdemovic, the case can now advance one step at a time. When these men are eventually apprehended, the prosecutor can convict them with Erdemovic's testimony.

In summary, arguments that favor plea agreements in domestic courts also favor them in the war crimes context. Plea-bargaining produces unique advantages in the difficult international environment of war crimes trials. It saves resources. It provides essential evidence where war, time or rogue nations have destroyed or silenced proof. It saves witnesses the trauma of cross-examination and emotional testimony. Finally it gives

¹⁷⁰ *Id.*

the prosecutor a powerful tool to isolate and convict the big fish when political considerations otherwise prevent prosecution. Now the article turns from discussion of the benefits of plea-bargaining to focus on how this tool furthers the goals of the Tribunal.

¹⁷¹ See generally, *S. Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1996).

¹⁷² SCHARF, *supra* note 11, at 152.

V. HOW THE PLEA BARGAIN MAXIMIZES THE GOALS OF INTERNATIONAL TRIBUNALS

The article begins its discussion of tribunals' goals by looking first to the objective of individual responsibility. Modern tribunals have steered primarily toward individual responsibility.¹⁷³ They punish individuals for bad conduct, not entire nations. Collective punishment is abhorred. Each war criminal convicted and individually punished asserts that individuals are responsible and not whole nations or races. In the Yugoslavian war many citizens never committed war crimes. Yet they bore guilt by national association. The only way to remove this guilt was to punish the perpetrators. Some maintain that tribunals' further peace by removing collective guilt and inserting individual accountability.¹⁷⁴

In the former Yugoslavia for example, the government could have prevented or at least minimized the atrocities. Instead FRY allowed these immense and wide-scale crimes.¹⁷⁵ In part, organized government power committed or helped them. These facts reflect badly on the nation as a whole.

When the power and resources of an entire state are bent toward atrocity, the gravity of the crime as well as the possible escape from punishment multiplies exponentially. The support, backing and resources of the state go to work. The state provides the power necessary to achieve atrocities on a broad scale. One individual with his or her own limited resources can not to hope kill a thousand unarmed men in broad

¹⁷³ Alvarez, *supra* note 31, at 2033.

¹⁷⁴ *Id.*

¹⁷⁵ Decision of Trial Chamber 1, Review of Indictment Pursuant to Rule 61, Radovan Karadzic and Ratko Mladic, Cases No. IT-95-5-D 16, 16 May 1995 (visited Mar. 29, 1999) <<http://www.un.org/icty/karadzic/decision-e/50516DF1.htm>>.

daylight, bury them in shallow graves never fearing punishment.¹⁷⁶ Without organized assistance, so bold a crime would be unimaginable. Yet this is exactly what happened in the former Yugoslavia.

It is this power of the State that has for so long helped Karadzic and Mladic avoid arrest and appearance before the ITCY.¹⁷⁷ From this context, each war crime trial takes on immeasurable human and international significance. Each case tried moves one step away from the idea that rogue states can immunize war criminals.

Strong poison takes strong medicine to overcome. In the case of Karadzic and Mladic, the plea bargain in combination with Rule 61 overcame the rogue power of FRY exercised in their behalf. The evidence became available no matter how hard their government may have tried to stop it. As the deal to testify was cut, the prosecutors gained the evidence to indict. Because of Erdemovic's agreement, these leaders are branded war criminal and any further attempts to shield them leaves FRY looking more isolated. Hopefully, other countries begin to blame the FRY government itself and not its people for the barbarism.

Without plea-bargaining the goal of individual responsibility is contradicted. To prove crimes against humanity, the prosecutor must show evidence that the crimes were both widespread and pervasive.¹⁷⁸ The widespread and pervasive nature of the crime requires the prosecutor to offer evidence that large numbers of people participated in the

¹⁷⁶ Transcript of Trial Chambers Hearing, Review of Indictment Pursuant to Rule 61, Radovan Karadzic and Ratko Mladic, Case No. IT-95-18-R61 and Case No. IT-95-5-R61, 5 July 1996 (visited Mar. 23, 1999) <<http://www.un.org/icty/transe5/960705IT.txt>> (Testimony of Drazden Erdemovic).

¹⁷⁷ McDonald Press Release, *supra* note 152.

¹⁷⁸ Int'l Crim. Trib. – Yugo., art. 4 Genocide 25 May 1993 (visited 29 Mar. 1999) <<http://www.un.org/icty/basic/i-b-ens.htm#4>>.

atrocities. This evidence necessarily implicates many of the rank and file members of the community. Such evidence places blame broadly upon the nation as a whole. It spreads guilt upon the people generally for the atrocities. Plea-bargaining avoids this problem focusing on the major figure. It permits conviction of the most notorious leaders without detailing the inflammatory facts. Prosecutors using plea-bargaining avoid the contradiction altogether.

Another aim of tribunals is revealing the truth and preserving the historical record accurately. This goal favors plea-bargaining. Without plea-bargaining prosecutors lose large portions of the record forever. The world wonders what really happened in the confusion of the conflict. History never sorts out the fate of many innocents, and the magnitude of the atrocities remain unknown and unpublished to the world. Plea-bargaining can bring lost facts to light. Erdemovic's bargain informed the ITCY "details of four incidents of which they did not previously know."¹⁷⁹

It has been suggested that plea-bargains are not a search for the truth, but instead an inducement to deception.¹⁸⁰ The accused in an effort to gain leniency will fabricate whatever he can to get his deal.¹⁸¹ He has nothing to lose and everything to gain. They claim many criminals are habitual liars not worthy of trust.

While these accusations may ring true in ordinary criminal trials, they fall short when applied in the war crimes context. In war one does not ordinarily deal with common criminals. Militaries are not made up of prison populations, but cross sections of societies.

¹⁷⁹ *Judgement*, *supra* note 1, at V. Application of the Law to the Facts, para. 16, iv. Cooperation with the OTP.

¹⁸⁰ Charles Maechling, Jr., *Truth In Prosecuting*, 77-JAN A.B.A. J. 58, 60 (1991).

¹⁸¹ *Id.*

The motive for committing war crimes is often different. Some people only commit war crimes under threat of death.¹⁸² Their public record may be clear of any previous criminal conduct. Much more likely, the actor commits their first ever crime.¹⁸³ The conduct may appear reprehensible to them as well.¹⁸⁴ If this is true, they will more likely feel remorse and desire to make restitution in some manner. Under these conditions they are much less likely to lie than an ordinary criminal.

The Erdemovic plea-bargain is a perfect example. He testified credibly.¹⁸⁵ He was not an ordinary criminal.¹⁸⁶ He desired to make amends for what he had done, and his personal safety was at risk.¹⁸⁷ Most of those who listened believed what he said was true.

The tribunal should not bar such positive results because of a possibility of false testimony. Instead, it should fashion rules to ensure truthfulness. Rather than ban, they should implement safeguards to prevent manipulation of an otherwise good system.

Deterring future war crimes is another goal of the tribunal and a good reason for using plea-bargains. Most war crimes occur in the presence or with the assistance of others. Take the killings at the farm near Pilica. The whole 10th Sabotage Detachment participated.¹⁸⁸ Plea-agreements alone do not deter these crimes. However when plea agreements force convictions, the convictions themselves produce the desired chilling effect. It follows that Plea-agreements can increase the number of convictions. The more

¹⁸² *Judgement*, *supra* note 1, at IV. Evidence, para. 14.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at para 16, Character.

¹⁸⁵ Transcript of Trial Chambers Hearing, Review of Indictment Pursuant to Rule 61, Radovan Karadzic and Ratko Mladic, Case No. IT-95-18-R61 and Case No. IT-95-5-R61, 5 July 1996 (visited Mar. 23, 1999) <<http://www.un.org/icty/transe5/960705IT.txt>> (Testimony of Drazden Erdemovic).

¹⁸⁶ *Judgement*, *supra* note 1, at IV. Evidence, para. 16.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at para. 13.

convictions, the greater the chilling effect.¹⁸⁹ In this indirect way, plea-bargaining deters war crimes and pushes forward the tribunal's goal of deterrence.

Plea-bargaining assists another tribunal goal by relieving the minds of anxious victims and restoring peace. A spouse may learn what happened to her loved one only through of plea-bargaining.¹⁹⁰ Never knowing the fate of a spouse or child tortures victims. The tribunal avoids becoming party to this evil by promoting as much openness as possible. Making agreements with accused war criminals, the tribunal opens the door to greater knowledge about the atrocities. The tribunal moves toward its goal of assisting victims.

Plea-bargaining helps restore peace in other ways as well. Since there are fewer criminals brought to justice by war crimes tribunals, each case becomes more significant. Even one major war criminal escaping justice damages the effort to reestablish the rule of law.¹⁹¹ If some perpetrators go free, surviving witnesses and victims will be left to fear further retribution.¹⁹² Weighed against these otherwise inevitable results, plea-bargains seem as small price to pay.

Many more lives are affected by an act of genocide than by a domestic criminal act. As Nuremberg attempted to show, the forgiveness of a nation, peace of the region or peace of the world may rest on major war criminals being brought to justice.¹⁹³ Without plea

¹⁸⁹ Power, *supra* note 66, at 10.

¹⁹⁰ *Judgement*, *supra* note 1, at V. Application of the Law to the Facts, para 16 (Erdemovic revealed details of four killings which the tribunal did not know previously).

¹⁹¹ Kofi Anna, *Secretary-General Welcomes Rwanda Tribunal's Genocide Judgement As Landmark In International Criminal Law*, Sept 1998 (visited Mar. 24, 1999)

<<http://www.un.org/News/Press/docs/1998/19980902.sgsm6687.html>>.

¹⁹² *Id.*

¹⁹³ *Id.*

agreements, the prosecution might lose the initial steps in this effort. The Karadzic and Mladic indictments illustrate plea-bargaining's critical role. Plea-bargains become most critical when there are no witnesses. In these situations it may be the only solution.

Another major goal of the ITCY is removing the appearance of victor's justice.¹⁹⁴ Plea-bargaining lends legitimacy to this goal by using witnesses from the defeated country (same ethnicity) to provide the condemning testimony. The Erdemovic case was again a good example of this principle in action. Erdemovic's testimony was an acknowledgment from the mouth of a Serbian that the conduct was criminal.¹⁹⁵ It is hard to argue a trial is victor's justice when the country itself provides the condemning testimony.

Finally, plea-bargaining strengthens the confidence of the tribunal's verdicts. By making agreements, the tribunal avoids the use of questionable evidence such as hearsay to convict. Plea agreements add fairness to the trial and also help dispel the claim of victor's justice.

Arguably there are costs and drawbacks associated with using plea-bargaining in international forums. Many have been articulated already in criticism of plea-bargaining's use in domestic courts. One of the primary criticisms is that criminals avoid fair and full punishment.¹⁹⁶ Another is that plea-bargains gives too much control to the prosecutor.¹⁹⁷ This concern is linked to still another fear that plea-bargaining can be unfair to the

¹⁹⁴ *Statement by UN Secretary-General, Kofi Annan*, (visited Nov. 20, 1998) <<http://www.un.org/icc/speeches/718sg.htm>>.

¹⁹⁵ Transcript of Trial Chambers Hearing, Review of Indictment Pursuant to Rule 61, Radovan Karadzic and Ratko Mladic, Case No. IT-95-18-R61 and Case No. IT-95-5-R61, 5 July 1996 (visited Mar. 23, 1999) <<http://www.un.org/icty/transe5/960705IT.txt>> (Testimony of Drazden Erdemovic).

¹⁹⁶ Roland Acevedo, *Is a Ban on Plea Bargaining An ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 992 (1995). See generally Sara N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L.J. 301, 307 (1987).

¹⁹⁷ Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1475 (1993).

defendant.¹⁹⁸ In the international trial there exists another concern about whether the prosecutors agreement improperly grants immunity.¹⁹⁹ Some think that when a country with jurisdiction considers the deal unjust, it may assert its own prosecution.

The fear that criminals will not receive full punishment arises when minor criminals are used to catch big perpetrators. Those making this claim argue from the perspective of the individual case. It may be true that one criminal gets a lighter sentence than he deserves,²⁰⁰ but this reasoning ignores the greater good pleas bestow upon society. The agreement aspects of plea-bargains bestow a synergistic affect. The affect is similar to that derived from economic agreements and transactions. Both parties come away with more than they would have if no agreement had been made. The defendant gains reduction of his sentence. Society obtains evidence to convict another possibly more harmful criminal. One who otherwise may have escape justice gets punished. Individually, justice may be cheated, but publicly, justice is better served.²⁰¹

Once again the Erdemovic case exemplifies how plea agreements dispense fair punishment. When the final sentence was read for Erdemovic, his time in jail was less than the parties had agreed.²⁰² Apparently, the judges thought Erdemovic's bargained-for sentence was too harsh.

The argument that plea-bargaining leaves too much control in the hands of prosecutors does not always prove true either. In a study of El Paso County, Texas, it was noted that when judges saw prosecutors agreeing with defendants for sentences more harsh

¹⁹⁸ Guidorizzi, *supra* note 23, at 753.

¹⁹⁹ MORRIS & SCHARF, *supra* note 4, at 114.

²⁰⁰ Acevedo, *supra* note 196, at 993.

²⁰¹ Welling, *supra* note 196, at 308.

than those generally given by juries, they rejected the agreements.²⁰³ There is also good evidence to refute the idea that defendants are not treated fairly in plea agreements. The same El Paso County study showed that guilty-plea defendants got shorter prison terms than those who contested their guilt.²⁰⁴ One cannot ignore that a plea bargain system becomes unfair when sentence disparity occurs between defendants with similar crimes. The solution, however, is to fashion limitations that eliminate these sentence disparities, not to reject plea-bargaining.

One final question still remains unresolved about plea-bargaining. That is whether plea-bargaining is internationally legitimate. Some have asked whether an international tribunal has the authority to grant partial immunity through plea agreements. Plea-bargaining is a limited form of immunity in the sense that it grants sentence reduction not based upon merit. Some authors suggest that a state with jurisdiction can retain the right to prosecute and punish the crimes regardless of the tribunal agreement.²⁰⁵ If the state does not recognize plea-bargaining in their domestic courts, one might question whether they will accept them in an international one. There is no satisfactory answer to this question at the present time.²⁰⁶

VI. CONCLUSION

At an earlier time in history plea-bargaining may have been shunned, yet today it is becoming more and more an acceptable judicial procedure. There are many notable examples of this favorable change toward plea-bargains. Even Asia shows signs the

²⁰² *Judgement*, *supra* note 1, at IX Penalty, para. 23 and VI. Plea Bargain Agreement para. 18.

²⁰³ Weninger, *supra* note 129, at 275.

²⁰⁴ *Id.* at 295.

²⁰⁵ MORRIS & SCHARF, *supra* note 4, at 114.

²⁰⁶ *Id.*

practice may be nearing acceptance. Japan's practice of dropping cases for changes in post trial factors embodies important characteristics of a plea-bargain. Certainly, plea-bargaining is becoming more common to judicial systems of the world than one might originally think.

It is still not certain whether plea-bargaining has taken on the cloak of customary international law and become "common to major legal systems of the world." One conclusion is certain though, the use of plea-bargaining at the ITCY raises its stature, and enlarges the possibility that it will be used in the future.

There are many compelling reasons for incorporating plea-bargaining as a tool in any international tribunal. Perhaps the greatest is the hope that plea-bargains will bring more war criminals to justice averting future atrocities. Many conflicts today end without clear victory and without the ability of controlling war crime scenes. Plea agreements may be the only hope of obtaining vital evidence in these situations. If the conditions in either Yugoslavia or even Iraq indicate how future wars will end, plea-agreements will assume a vital role. They will be one way the international community ensures rogue governments cannot cloak top leaders with war crime immunity.